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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

TRADERS COMPRESS COMPANY, a corporation, *Petitioner*,

v.

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Traders Compress Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, in *Maurice J. Tobin, Secretary of Labor, United States Department of Labor, Appellant, vs. Traders Compress Company, a corporation, Appellee,* No. 4417, entered September 2, 1952, reversing the judgment of the District Court for the Eastern District of Oklahoma.

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 19-29) are unreported. The opinion of the Court of Appeals (R. 369-376), including dissenting opinion, is reported at — F. (2d) —.

JURISDICTION

The judgment of the Court of Appeals was entered on September 2, 1952 (R. 376). A petition for rehearing, filed September 22, 1952 (R. 377-388), was denied October 1, 1952 (R. 389). The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

Whether, in his regulation[1] purporting to define the area of production of all agricultural and horticultural commodities pursuant to § 13(a)(10) of the Fair Labor Standards Act of 1938, as amended,[2] the Administrator of the Wage and Hour Division, United States Department of Labor,[3] has made a reasonable and valid definition of the area of production of cotton within the meaning and intent of said § 13(a)(10), or whether he has thereby exceeded his Congressional grant of authority.

STATUTES INVOLVED

The pertinent statutory provisions are printed in Appendix A, pp. 21-22.

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[1] 29 C.F.R. 536.2, set out in Appendix B, pp. 22-24.

[2] c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; 29 U.S.C. 201, *et seq.* (213(a)(10)), set out in Appendix A, pp. 21-22.

[3] Whose functions and powers were transferred to Respondent Secretary of Labor by 1950 Reorg. Plan No. 6, § 1, 2; 15 F. R. 3174; 64 Stat. 1263; 5 U.S.C. 611 (note) set out in Appendix A, p. 22.

STATEMENT

This cause originated as an action brought in the District Court by five watchmen employees of petitioner Traders Compress Company (a corporation) in an effort to recover from their employer the difference between straight-time wages received and wages computed at the minimum wage prescribed by § 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, plus a like sum as liquidated damages. No claim was asserted for overtime premium (presumably because of the overtime exemption provided in § 7(c) of the Act for employees of employers engaged in compressing cotton) (R. 2-4).

The respondent Secretary of Labor was allowed to intervene as a party plaintiff, seeking an injunction forbidding future alleged violations of the minimum wage requirement with respect to the original plaintiffs (R. 10-11, 15).

Petitioner (defendant below) defended primarily on the ground that plaintiffs were and are exempt from the minimum wage requirement of § 6(a)(1) of the Act (as well as the overtime requirement of § 7(a)) by reason of the exemption provided in § 13(a)(10) for "any individual employed within the area of production (as defined by the Administrator), engaged in handling, . . . storing, ginning, . . . (or) compressing, . . . of agricultural or horticultural commodities for market",—and that the Administrator's (then and now) current regulation (Appendix B, pp. 22-24) purporting to define the area of production of all agricultural and horticultural commodities does not define the area—or any area—of production of cotton, is ultra vires under the Administrator's Congressional grant of authority, is arbitrary, and capricious, and, therefore, invalid, and void.

In its Conclusion of Law No. 4 (R. 28-29), the District Court held that the said regulation does not define the area of production of cotton, is capricious and arbitrary, and therefore invalid and void; and (Conclusion of Law No. 5, R. 29) refused to award judgment either to plaintiffs or to

intervenor (respondent). Two decrees were entered. The first decree (unprinted here, but see Conclusion of Law No. 5, R. 29) refused to award judgment to plaintiffs, but (following the decision of the Supreme Court in *Addison, et al. vs. Holly Hill Fruit Products, Inc.*[4]) retained jurisdiction of plaintiffs' claim, pending issuance by the Administrator (now respondent—see Appendix A, p. 22) of a valid definition. The original plaintiffs did not appeal. The second decree is a final judgment denying intervenor's application for injunction. Intervenor (respondent) appealed. Over the vigorous dissent of Judge Pickett (R. 374-376) the Court of Appeals reversed the judgment of the District Court (R. 369-374). A petition for rehearing (R. 377 et seq.) was denied (R. 389).

Throughout the period involved, defendant below (petitioner) was engaged at its compress-warehouse plant in Muskogee, Oklahoma (Pop. 32,332), exclusively as a bailee-for-hire, in compressing,[5] storing and otherwise physically handling ("compress-warehousing") baled cotton for market. Baled cotton is an agricultural commodity in its raw or natural state. (D. Ct. Finding of Fact No. 9, R. 21-22). All cotton received at that plant was grown on Oklahoma farms,—and was ginned[6] by and received from Oklahoma ginning establishments. Most of such cotton ultimately moved or will move in interstate commerce. (Ibid., Nos. 10-11, R. 22).

Each of the original plaintiffs was employed as a watchman in defendant's plant at Muskogee, Oklahoma. Each

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[4] 322 U. S. 607, 64 S. Ct. 1215; Rehearing denied, 323 U. S. 809, 65 S. Ct. 27.

[5] Reducing the size of cotton bales as turned out by gins from about 40.5 cubic feet to about 19.75 cubic feet (about 12.5 cubic feet when for shipment overseas) (R. 112-113, par. 21). The only purpose or effect of compression is reduction of the size of the bale for economy in use of storage and transportation facilities (*Ibid.*, D. Ct. Finding of Fact No. 12, R. 22).

[6] Ginning means separation of the lint (cotton fibers) from the cottonseed, and packing of the lint into rectangular bales weighing about 500 lbs. each (R. 109, par. 11).

was engaged in the compressing and storing ("compress-warehousing" of raw cotton for market. (Ibid., Nos. 5, 7-9, 13; R. 20-25); Certified Record pp. 341-342, unprinted pars. 2-4).

Defendant's plant is located immediately in a region, a zone and a locality of bountiful cotton production (D. Ct. Finding of Fact No. 16, R. 26). Cotton is grown in every direction from Muskogee,—indeed within the corporate limits of Muskogee, and within 800 yards of defendant's plant (R. 130, par. 85; R. 133-4, par. 101). The economy of Muskogee and the surrounding territory is characterized and dominated by agriculture. Cotton is the most important cash crop (R. 132-137, pars. 91-117; R. 301).

Muskogee's population exceeds 2,500, and thereby fails to meet the population test of the current regulation when applied to plant location. While the bulk of cotton receipts at defendant's plant is received from within 50 airline miles, and from places having populations under 2,500,—more than 5% of monthly receipts (for 13 of the 19 months involved) was received either from towns of 2,500 or greater population or from beyond 50 airline miles, or both. Therefore defendant's operations did not for any month meet *all* of the requirements imposed by the Administrator's (respondent's) regulation (D. Ct. Finding of Fact No. 13, R. 24-25). None of the 17 compress-warehouse plants in Oklahoma meets all of such requirements (D. Ct. Finding of Fact No. 17, R. 26). In at least 13 of the 19 other cotton-producing states there is no compress-warehouse plant which can meet all of such requirements (R. 241). Thus the entire area of at least 14 (out of a total of 20) cotton-producing states is placed *outside* the "defined" area of production.

Of the total receipts at petitioner's plant—28,916 bales—during the 1949-50 cotton season (12 months ending July 31, 1950), 76.7% was received from within 50 airline miles, 60.3% was received from points nearer to Muskogee than to any other compress-warehouse location, and 79.7% was

received either from such nearer points or from within 50 airline miles of Muskogee. Of the total receipts—4,125 bales—during the 1950-51 cotton season prior to trial (7 months ending February 28, 1951), 87.2% was received from within 50 airline miles, 72% was received from points nearer to Muskogee than to any other compress-waresouse location, and 88.7% was received either from such nearer points or from within 50 miles of Muskogee (Ibid., also unprinted portion of Certified Record, pp. 404-424). The points and distances from which cotton was and is received are controlled exclusively by the individual cotton owners or Commodity Credit Corporation—and are completely beyond the control of petitioner (defendant below) (R. 121-122, pars. 36-37).

Cotton compress-warehouse plants, generally, receive less than 50% of total annual receipts from within 50 airline miles (R. 137-138, par. 121; R. 307), and only 33% from points having less than 2,500 population located within 50 airline miles (R. 308). 81.1% of all compress-warehouse plants are located in places having 2,500 or more population (R. 241).

The current regulation was promulgated in the light of evidence indicating that in all probability no compress-warehouse plant in the United States could meet its requirements (D. Ct. Finding of Fact No. 21, R. 27).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals, in its majority opinion, erred:

1. In accepting the hearsay of the Administrator's gratuitous and self-serving "findings" (R. 337-354, 357-358) as proof of the opinions, conclusions and purported statements of fact included therein, and in basing its judgment primarily on such opinions, conclusions and statements.

2. In holding that the Administrator's (now respondent's) regulation, and the criteria thereof, are not arbitrary and capricious.

3. In failing to hold that such regulation is an unauthorized and unlawful assumption of legislative power.

4. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. There is presented here a much litigated question of importance in the administration of the Fair Labor Standards Act which has not been, but should be, settled by the Supreme Court. It was for the same reason that certiorari was granted (320 U. S. 725) in *Addison, et al. vs. Holly Hill Fruit Products, Inc.*,[7] where a substantially similar question was presented—i.e. the validity of the Administrator's *then* current definition of "the area of production",—and where such definition was condemned.

Since the current definition was issued, at least eighteen other actions have been brought under the Act, in which the employer-defendants have defended on basis of invalidity of the Administrator's *now* current definition. Three cases in a state court (Appendix C, p. 24) have been decided in favor of defendants (impliedly holding the definition invalid), without written opinions. At least fifteen additional actions (Appendix D, p. 25) have been brought in various state and federal district courts, none of which has been decided by the trial court.

To allow the decision of the Court of Appeals to stand as a precedent would precipitate a great additional volume of litigation involving cotton ginning, cotton storing, cotton compressing, and the handling, packing, storing, pasteurizing, drying, preparing and canning for market of the many other agricultural and horticultural commodities, and in making dairy products. Thus, widespread confusion and litigation may be expected to continue until this troublesome issue is settled by the Supreme Court.

The significance of the issue is not confined to employment at wages less than 75 cents an hour. It extends also

[7] 322 U. S. 607 (609), 64 S. Ct. 1215.

to application of the overtime requirement of § 7 of the Act, although the overtime requirement is not directly involved here. § 13(a)(10) is an exemption from overtime as well as from the minimum wage requirement.

The effects of final resolution of this issue will not be confined to the parties hereto or even to the operators and employees of cotton-handling establishments, but will extend to thousands of other employers, and to their employees probably numbering hundreds of thousands. In cotton-handling operations alone, such effects will extend to the great majority of 8,097 cotton gins, 1,212 cotton warehouses and 313 compress-warehouse plants, and of their approximately 90,000[8] employees (R. 33, 49, 67-68, 124 (par. 46), 126 (par. 54), 202-216, 241, 243-257, 259-291).

Of the total annual cotton receipts, generally, of cotton warehouse and compress-warehouse plants located in cotton-producing states, more than 50% is received from beyond the mileage limitation of the Administrator's definition, more than 50% is received from places of 2,500 or greater population, and more than 67% is received from places, either beyond the mileage limitation, or having populations of 2,500 or more, or both (R. 310). For compress-warehouse plants alone, these percentages are, respectively, 50.3%, 55.2%, and 67% (R. 308). Of the combined total of cotton receipts at warehouse and compress-warehouse plants generally, less than 6% is known to be received by plants meeting all criteria of the Administrator's definition (11 compress-warehouse, and 26 warehouse plants) (R. 311). Those few plants of course receive through this regulation a sharp competitive advantage over hundreds of other such plants located in the same cotton-producing areas.

The numbers of employers and their employees engaged in producing areas in storing and performing the other operations named in § 13(a)(10) of the Act on all other

[8] Assuming average employment of 8 persons per gin, 8 per warehouse, and 50 per compress-warehouse plant.

agricultural and horticultural commodities and in making dairy products, who would be similarly affected, are doubtless many times greater than the total numbers engaged in the named cotton-handling operations. If the decision of the Court of Appeals is allowed to stand, adverse effects (in the form of increased charges for services, and reduced prices for their crops) would extend to the operators of the great majority (R. 311) of the more than 1,500,000 cotton farms (R. 109, par. 10) in the United States, and to the farmer-producers of other agricultural and horticultural commodities—directly defeating the basic purpose of the exemption, which is to protect the farmers against increased labor costs of performing such operations. 81 Cong. Rec. 7877, 83 Cong. Rec. 7325, 7401; *Tobin vs. Flour Mills of America, Inc.* (CA-8, 1950), 185 F. (2d) 596, 603.

2. The majority opinion of the Court of Appeals conflicts with the language and principle of, and misconstrues and misapplies, the Supreme Court's decision in the Holly Hill case.

In its decision (R. 374) the Court of Appeals makes the wholly erroneous statement: "To be sure, the population test does not effect discrimination between plants in the same geographical area, as did the number of employees test condemned in the Addison (Holly Hill) case."

The essence of the *Holly Hill* decision, as petitioner understands it, is that—in defining the area of production of any commodity—the Administrator is restricted to defining the geographic bounds of the land area within which that commodity is actually produced, and that he cannot discriminate or differentiate between establishments within such bounds. These points were repeatedly emphasized (322 U. S., pp. 614-616). Yet that decision is applied by the Court of Appeals as authority for approving a regulation which does not define the bounds of any zone of agricultural production; and which, by *each* of the tests provided therein, discriminates between

handling establishments within the same area and the same locality, within the zone of agricultural production, and within the artificial circular areas involved in the regulation.

The only geographic lines drawn by the regulation are the circles of ten, fifteen, twenty, and fifty airline miles radius, which are drawn only around those *individual establishments* which are not located in or near places of 2,500 or greater population,—from within each of which circles the establishment at its center is required to have received at least 95% of commodity receipts *during the preceding calendar month* (Appendix B, pp. 22-24). The regulation draws no such circle around 15 of the 17 compress-warehouse plants in Oklahoma, or around any such plant in 13 of the 20 cotton-producing states, or around 257 of the total of 313 plants in all cotton-producing states (R. 241).

Those fifty-mile circles are drawn—not on the basis of agricultural production—but entirely on the basis of population. Production within the circle is not required if the points from which 95% of monthly receipts is received are (a) within the circle, and (b) have populations less than 2,500. Regardless of the volume and nearness of production, the establishment must be "in the open country or in a rural community"—and must *not* be in or near a place of 2,500 or greater population. Otherwise, no circle is drawn around it (Appendix B, p. 23).

Such receipts (95%) must have been received from points within the circle which, themselves, do not have populations as great as 2,500 (Ibid.) (unless it can be shown that receipts from such points were actually grown within the circle) (Ibid., par. (b)(2)(iii)). The qualification is parentheses is impossible of application (R. 42-45) and therefore unreasonable and unlawful.

No such circle defines any area of production. Assuming that one such plant meets all requirements of the regulation for any particular month, there may be, *within the cir-*

cle around that plant, any number of competing plants each of which is excluded from the defined area of production (e.g. map exhibits, R. 143, 145, 147, 317). Thus the regulation discriminates between plants located within the same circle,—the only geographic lines drawn by the regulation.

In many instances there are two or more competing compress-warehouse plants at the same location (R. 241, columns 2 and 3). In each of those instances where the plant location meets the population test,—application of the distance test, or the population test, or both combined, *to receipts during the preceding month*, produces discrimination between plants at the same location whenever the preceding month's receipts at one of such plants do, and at the other plant or plants do not, meet the requirements of both the population and distance tests.

The population test *applied to the location of the establishment* also produces discrimination between plants at the same location whenever one plant is and another plant is not situated inside or within the prescribed distance (1-3-5 miles) of a place of 2,500 or greater population (Appendix B, pars. (a)(1), (b)(1)).

The Court of Appeals misconstrues the *Holly Hill* decision as approving—by implication—the use of limitations on the distance from which commodities are received at an establishment (as contrasted with distance between an establishment and actual agricultural production),—specifically the "ten-miles" and "general vicinity" limitations involved in that proceeding. In that case the "general vicinity" test was met by respondent Holly Hill and its validity was not in issue. It was struck down with the remainder of the definition (322 U. S. 618). The "ten-miles" test, although in issue, had been abandoned by the Administrator, and (presumably for that reason) its validity and applicability were not conclusively determined by the Court.

Certainly this Court did not say—and Congress, in the clear language of § 13(a)(10), neither said nor implied—

that the named operations are exempt only when performed on those particular units of the commodity which are produced within the locality or vicinity of the establishment involved. Had such an intention existed, Congress could easily have expressed it;—but clearly it would not have served the purpose of Congress in providing the exemption. Such misconstruction of the *Holly Hill* decision (and of the exemption) by the Court of Appeals will defeat, rather than serve, the Congressional purpose.

The monthly cotton receipts at petitioner's plant met the tests of the regulation during six scattered months of the period involved, and failed to meet those tests during the remaining thirteen months (D. Ct. Finding of Fact No. 13, R. 25). This illustrates the fact that, if a plant location meets the population test, the regulation places that plant within, or outside, the defined area of production—for each successive calendar month (Appendix B, p. 24, par. (b)(3)) —depending on whether more than 5% of receipts during the preceding month failed to meet either the distance test, or the population test, or both combined. Thus it is impossible for the operator of such a plant to determine in advance whether his plant will be in the "defined" area of production for any given month.

Certainly in the *Holly Hill* case the Supreme Court did not sanction any distance test which—either alone or in conjunction with other criteria—could or would cause an establishment to move in and out of the "defined" area of production from month to month. By application of the distance test, by application of the population test to points from which commodities are received, and by joint application of both tests, the current definition produces exactly that result,— regardless of the volume, and without necessary regard to the existence, of cotton production in the surrounding territory. The regulation does not define a geographic area of production. Instead, it attempts to restrict application of the exemption by use of artificial tests which have no necessary relation to agricultural production.

The Court of Appeals apparently construed the Supreme Court's *Holly Hill* decision as confirming in the Administrator authority to define *the term* "area of production", despite the specific finding in that decision (322 U. S. 613, note 6) that the Administrator's authority is to define—not the *term* "area of production"—but *the* area of production.

In the *Holly Hill* case the Court stated (613-614) that "area calls for delimitation of *territory, in relation to* the economic factors operating between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production; and that the Administrator might "properly weigh and synthesize all" relevant factors. The Court of Appeals misapplies such statements as confirming authority in the Administrator, *without any actual "delimitation of territory"*, to make a regulation *in terms of* factors which have no necessary inter-relation or inter-operation "between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and more or less near their production".

In his "findings" the Administrator (R. 338) said concerning the *Holly Hill* decision and in support of his population test: "The (Supreme) Court noted the Congressional intent to distinguish between rural communities and the urban centers . . . ". Also referring to the *Holly Hill* decision, the Court of Appeals (R. 371-372) said: " . . . it is evident . . . that the exemptions must be determined by drawing geographic lines in order to differentiate between that which is predominantly rural in its economic sense, and that which is essentially industrial". That Court (R. 373) re-stated "the objective" as "distinguishing establishments subject to 'urban-industrial' conditions from those under the influence of 'rural-agricultural' conditions".

These conclusions conflict with the principle of non-discrimination between plants in the zone of production set

forth in the *Holly Hill* decision, and can result only from misconstruction of the following circumstance:

In its *Holly Hill* decision (322 U. S. 607, 615, footnote 8) the Supreme Court quoted (from the legislative debates on this exemption) statements of Senator Schwellenbach and Representative Biermann, sponsors of the exemption, as supporting its conclusion that Congress intended to give an exemption to the area of production,—"without differentiating as between establishments within such area . . . ". The quotation of Representative Biermann was an oblique answer to a question concerning Iowa packing houses, to which he added the apparently irrelevant comment: " . . . but may I say that all over this country it has been recognized that there should be a labor differential between the large city and the little town". Only a moment later, Mr. Biermann made it clear that by "large city", he referred to the huge industrial metropolis, and not to cities in farming areas (83 Cong. Rec. 7401):

> "I do not find fault with the Committee on Labor, but I think whereas they are the experts who have knowledge regarding the big factories in *Jersey City, New York City, and some of the other large cities*, we who come from the farm areas are best qualified to say what terms should apply to labor in those areas." (Emphasis added)

The Administrator apparently seized upon the Supreme Court's quotation of Representative Biermann's oblique answer as ground for his basic error, i.e. his conclusion that a primary object of his definition should be to distinguish between "rural-agricultural" and "urban-industrial" conditions. (As shown below, Congress' primary object was to protect the farmer from increased costs.) The Court of Appeals (R. 374) utterly accepts and adopts as its own the Administrator's misconstruction and misapplication of the *Holly Hill* decision.

Even had Congress intended the making of such a distinction to be a primary object of the Administrator's defi-

nition,—that object is not achieved by the current definition. The Court of Appeals so found (R. 374). e.g. Muskogee, Oklahoma is excluded by the definition from the defined "area", although its economy is characterized and dominated by agriculture (R. 132-136, 301). The economic influences of agricultrual production—as recognized by Congress, and as implied in the *Holly Hill* decision (p. 614)—necessarily pervade *the entire area* of agricultural production. They are not stopped at the outskirts of towns or cities within such area merely because the populations of such places exceed some arbitrary figure. Such influences are not affected by the populations of places within that area, or by the distances which commodities move *within that area* to reach the establishments which are available to—and chosen by—farmers and other owners for the servicing of their annual crops.

In the legislative debates, the sponsors of this exemption from the Act (and exception to its policy) made it clear that the purpose of the exemption is to protect the farmer against increases (resulting from the impact of the Fair Labor Standards Act) in the ultimate cost to him of the servicing and marketing of his crop. Senator Schwellenbach, sponsor of the exemption in the Senate, said:

> "The purpose of the amendment is not for the protection of the packing plant * * *. These packing plants just pass the cost back to the man who produces the apples. The farmer pays the bill." (81 Cong. Rec. 7877)

Representative Biermann, sponsor of the exemption in the House of Representatives, expressed this purpose even more forcefully and explicitly, and elaborated upon it at some length (83 Cong. Rec. 7325, 7401).

> " . . . it appears that Congress in granting the exemption expressed in Section 13(a)(10) was acting for the protection of the farmer to make possible the storage and marketing of his crops at reasonable cost in facili-

ties and at markets *which he was compelled to use.*" (Emphasis added) *Tobin* v. *Flour Mills of America, Inc.* (CA-8, 1950), 185 F. (2d) 596 (603).

Manifestly, Congress was convinced that the cotton farmer bears the costs of compressing, storing, ginning, and handling of his crop, and determined that such servicing should be exempt when performed within cotton-producing territory. The trial court (Finding of Fact No. 14, R. 25-26) found that increases in the costs of compressing and warehousing cotton are substantially borne by the cotton farmer.

Petitioner submits that, by selecting and using the phrase "area of production", the Congress itself effected a complete synthesis of the "factors" referred to (at page 614) in the *Holly Hill* decision,—and that any proper and literal definition of the area of production of cotton would necessarily and automatically give full effect to such synthesis. Petitioner believes and submits that, in its discussion of "complicated economic factors", "factors relevant to the subject matter", and in its statement "in delimiting the area the Administrator may properly weigh and synthesize all such factors" (p. 614 of the *Holly Hill* decision), the Supreme Court was referring only to those factors which affect the farmer's pocketbook, and was simply recognizing the truth of the foregoing statements.

Petitioner believes that the Court of Appeals has misconstrued that discussion in the *Holly Hill* opinion as authority for the Administrator to depart from the real Congressional purpose of the definition,—and to pursue an otherwise unlawful course of action designed to restrict the scope of the exemption by "defining" in terms of factors which are immaterial if not wholly irrelevant to the Congressional purpose. In effect, the Court of Appeals mistakenly construes the *Holly Hill* decision as approving the Administrator's assumption of authority—not to define the area *within which workers have been exempted by the Congress*

—but rather to decide and determine which workers *should be* and which *should not be* so exempted (R. 372[9]) and the *basis* for exemption. Even if Congress had intended to delegate such authority, it has wholly failed to express such a purpose, or to provide the necessary standards to render constitutional such a broad grant of authority. In reality the Administrator has exceeded his authority, and assumed the legislative prerogative of Congress in violation of Article I, Section 1, of the Constitution of the United States.

3. This proceeding involves a point on which the Supreme Court expressly reserved judgment in the Holly Hill case. One of the two administrative definitions in issue before this Court in the *Holly Hill* case required that the establishment not be located in any place having a population of 2,500 or more. In its decision (322 U. S. 607, 610, and footnote 2) this Court expressly reserved judgment on the validity of that requirement. The same requirement is included in the now current definition (Appendix B, pp. 22-23). The decision of the Court of Appeals herein is based in essential part on a finding that the requirement is a valid one.

This is the first proceeding considered by any appellate court in which every feature of any of the Administrator's "definitions" has been brought squarely in issue,—and which, therefore, requires comprehensive and decisive review of the entire regulation.

4. The decision of the Court of Appeals is in error, not only in the conclusion reached, but also in the bases on which that conclusion is predicated. This is demonstrated by much of the material submitted under reasons 1 and 2, above.

That decision overlooks or ignores the fact that the population test of the regulation applies to all points *from which*

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[9] Where the Court of Appeals referred to the Administrator's "complex task of determining the kinds of establishments that should or should not be exempt ——."

an establishment receives a commodity, as well as to the location of the establishment. It also overlooks or ignores the month-to-month application of the regulation, and the fact that any establishment (not in or near a place of 2,500 or greater population) may move in and out of the "defined" area of production from month to month (without necessary regard to the volume or proximity of production) depending on application of the population and distance tests *to its monthly receipts.*

That decision also overlooks or ignores the District Court's Finding of Fact No. 21 (R. 27) that the Administrator's regulation was issued in the light of (uncontradicted) evidence indicating that its population test (applied to plant location alone) would exclude 82%, and that its fifty-mile distance limitation on receipts in all probability would exclude 100% of all compress-warehouse plants from the benefits of the exemption (Certified Record, unprinted p. 224).

While giving lip service to Congress and to the Supreme Court's opinion in the *Holly Hill* case, the Court of Appeals bases its decision primarily upon the gratuitous "findings" (R. 337-354, 357-358) by which the Administrator undertook to justify his regulation,—and the (mis)constructions therein placed on the exemption, and on the Supreme Court's decision in the *Holly Hill* case. The latter half of the decision (R. 372-374) consists mainly of repetition and paraphrasing of those "findings".

Such "findings" were not required, were not issued under a departmental seal, were not published in the Federal Register, and were not introduced herein under seal or under oath. They were admitted over objection by the District Court (Certified Record, unprinted pp. 151-153). The District Court accorded to them at least all of the weight and credibility that they deserve (Findings of Fact Nos. 21, 22; R. 27-28).

Without apparent reservation, the Court of Appeals accepts those "findings" as proving the truth, not only of

their (often dubious) "factual" statements, but also of the opinions and conclusions expressed. There is no other evidence to support its adoption of such statements, opinions and conclusions.

Even if such "findings", under the public document rule, were properly admissible, they should not be considered of probative value as to opinions and conclusions expressed therein. Otherwise any administrative official could always successfully defend his arbitrary and capricious actions by the simple expedient of introducing his self-serving opinions and conclusions and having them accepted as facts determinative of the issue. Precisely that result appears to have been produced before the Court of Appeals.

Senator Schwellenbach, sponsor of the exemption in the Senate, unequivocally stated of a large apple-packing plant in Winchester, Virginia:

> "If the work done in that plant is as described in the amendment, it would be exempt." [10]

Under the Administrator's current regulation, and the decision of the Court of Appeals, that plant is excluded from the "defined" area of production, and from the benefits of the exemption (by the population test alone)—because the population of Winchester, Virginia—now, as in 1930—exceeds 10,000 (1950 Census).

Thus the current regulation and the decision of the Court of Appeals are clearly contrary to the Congressional intent.

The population test of the current regulation was applied to plant locations by one of the Administrator's earlier regulations, combined with a ten-mile distance limitation on receipts. Another earlier regulation applied to receipts a "general vicinity" distance limitation. Those tests were directly in issue, and were decisively condemned in the District Court decisions cited in Appendix E (p. 26). Peti-

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[10] 81 Cong. Rec. 7877, quoted in *Addison, et al.*, v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, 614, 64 S. Ct. 1215.

tioner submits that the reasoning of those decisions is sound, and should be adopted by the Supreme Court.

The Administrator's regulation ignores the Congressional intent, ignores the obvious meaning of the clear language of the exemption, usurps the legislative power to alter the basis of the exemption, undertakes by means of artificial, extraneous and unauthorized criteria to restrict the application of the exemption granted by Congress, and thereby denies the intended benefits of the exemption to the great majority of those for whose benefit it was enacted. That regulation is invalid and void. The decision of the Court of Appeals which seeks to uphold it should be reviewed and reversed by the Supreme Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 7, 1952

APPENDIX A

Pertinent Statutory Provisions

Fair Labor Standards Act of 1938, as amended, c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910; 29 U.S.C. 201, et seq.:

§ 3(f) (203(f)) "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 15(g) of the Agricultural Marketing Act, as amended), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

§ 4(a) (204(a)) There is created in the Department of Labor a Wage and Hour Division which shall be under the direction of an Administrator, to be known as the Administrator of the Wage and Hour Division (in this Act referred to as the "Administrator") • • •.

§ 6(a) (206(a)) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) not less than 75 cents an hour; • • •.

§ 7(a) (207(a)) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

§ 13(a) (213(a)) The provisions of sections 6 and 7 shall not apply with respect to • • • (6) any employee employed in agriculture • • •. (10) any individual

employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; • • •.

1950 Reorganization Plan No. 6, 15 F.R. 3174, 64 Stat. 1263, set out in note under 5 U.S.C. 611:

§ 1 Transfer of functions to the Secretary.—(a) Except as otherwise provided in subsection (b) of this section, there are hereby transferred to the Secretary of Labor all functions of all other officers of the Department of Labor and all functions of all agencies and employees of such Department.

(b) This section shall not apply to the functions vested by the Administrative Procedure Act (60 Stat. 237) in hearing examiners employed by the Department of Labor.

§ 2 Performance of functions of Secretary.—The Secretary of Labor may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of Labor of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan.

APPENDIX B

Text of the Administrator's current regulation purporting to define the area of production of all agricultural and horticultural commodities.

(29 C.F.R. 536.2 (Federal Register, December 25, 1946))

"Area of Production" as used in section 13(a)(10) of the Fair Labor Standards Act

(a) An individual shall be regarded as employed in the "area of production" within the meaning of Section 13(a)-

(10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) if the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:

(i) with respect to the ginning of cotton—10 miles;

(ii) with respect to operations on fresh fruits and vegetables—15 miles;

(iii) with respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection—20 miles;

(iv) with respect to the compressing and compress warehousing of cotton, and operations on tobacco (other than Puerto Rican leaf tobacco), grain, soybeans, poultry or eggs—50 miles.

(b) For the purposes of this regulation:

(1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within

one air line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

three air line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or

five air line miles of any city with a population of 500,000 or greater

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from

farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

APPENDIX C

Cases Decided

Involving the issue of validity of the Administrator's current definition of the area of production under Sec. 13(a)(10) of the act.

Barney Hayes v. American Compress & Warehouse Co. No. 110,515*

Ivy C. Dupree v. American Compress & Warehouse Co. No. 110,516*

David C. Cook v. American Compress & Warehouse Co. No. 110,517*

* In the First District Court, Parish of Caddo, State of Louisiana. Judgments for defendant entered without written opinion June 13, 1952.

APPENDIX D

Cases Pending

Involving the issue of the validity of the Administrator's current definition of the area of production under Sec. 13(a)(10) of the act.

Maurice J. Tobin, Secretary of Labor, v. W. F. Jenkins d/b/a Vidalia Cotton Oil Co., Civil No. 53 U.S.D.C. S.D. Ga., Swainsboro Div. (cotton and peanuts)

Maurice J. Tobin, Secretary of Labor, v. W. F. Jenkins d/b/a Vidalia Cotton Oil Co., Civil No. 55 U.S.D.C. S.D. Ga., Swainsboro Div. (cotton and peanuts)

Maurice J. Tobin, Secretary of Labor, v. Macon Peanut and Storage Co., Civil No. 813 U.S.D.C. M.D. Ga., Macon Div. (peanuts)

John A. Nix, et al., v. Farmers Mutual Exchange of Calhoun, Inc., Civil No. 728 U.S.D.C. N.D. Ga., Rome Div. (poultry and feed)

R. L. Allsup v. Traders Compress Co., No. 10,119 D. C. Jackson County, Okla. (cotton)

Charlie W. Cain v. Traders Compress Co., No. 10,120, D. C. Jackson County, Okla. (cotton)

P. M. Graves v. Traders Compress Co., No. 10,121, D. C. Jackson County, Okla. (cotton)

Austin Smith v. Traders Compress Co., No. 10,122, D. C. Jackson County, Okla. (cotton)

Amos B. Kirby v. Traders Compress Co., No. 10,123, D. C. Jackson County, Okla. (cotton)

Tollie Miller v. Harold Lovvorn d/b/a Cotton Mill Warehouse, Civil No. 3046-N.E. U.S.D.C. N.D. Ala. (cotton)

Earnest Beck, et al., v. Traders Compress Co., Civil No. 3003, U.S.D.C. E.D. Okla. (cotton)

Thomas Jefferson Stevens, et al., v. Traders Compress Co., Civil No. 2982 U.S.D.C. E.D. Okla. (cotton)

Maurice J. Tobin, Secretary of Labor, v. King Edward Tobacco Co. of Florida, Civil No. 340-T U.S.D.C. N.D. Fla., Tallahassee Div. (tobacco)

Maurice J. Tobin, Secretary of Labor, v. Joseph T. Budd, et al., d/b/a J. T. Budd, Jr. & Co., Civil No. 305-T U.S. D.C. N.D. Fla., Tallahassee Div.

N. S. Worley v. Traders Compress Co., No. 129298, District Court, Oklahoma County, Oklahoma. (cotton)

APPENDIX E

Decisions holding invalid the use of population and distance criteria as employed in the Administrator's earlier definitions.

1. Decisions specifically condemning the 2,500 population test applied to locations of handling establishments:

   Lake Wales Citrus Growers Ass'n. v. Andrews, U.S. D.C. S.D. Fla. (1939) (unreported in F. Supp.), 1 CCH Labor Cases 18429. Reversed because responsible parties were not served, Janes, et al., v. Lake Wales Citrus Growers Ass'n., C.A.-5 (1940), 110 F. (2d) 653.

   Fleming v. Farmers Peanut Co., U.S.D.C. M.D. Ga. (1941), 37 F. Supp. 628. Affirmed, C.A.-5 (1942) 128 F. (2d) 404 (a different definition was involved on appeal).

   Clark, et al., v. Jacksonville Compress Co., U.S.D.C. E.D. Tex. (1941), 45 F. Supp. 53.

   Bruno v. Hills Bros., U.S.D.C. P.R. (1943) (unreported in F. Supp.), 7 CCH Labor Cases 61763.

2. Decisions specifically condemning the "ten miles" and "general vicinity" distance limitations:

   Lake Wales Citrus Growers Ass'n. v. Andrews ("ten miles" limitation)

   Fleming v. Farmers Peanut Co. ("ten miles" limitation)

   Clark, et al., v. Jacksonville Compress Co. ("ten miles" limitation, and "general vicinity" limitation)

3. Decisions condemning entire definitions including population and distance criteria, without singling out either for discussion:

   Byus v. Traders Compress Co., U.S.D.C. W.D. Okla. (1942), 59 F. Supp. 18 (2500 population—ten mile formula, seven persons—general vicinity formula, and ten persons—general vicinity formula)

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 441

TRADERS COMPRESS COMPANY, a corporation,
Petitioner

v.

MAURICE J. TOBIN, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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MEMORANDUM FOR RESPONDENT

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 19-29) are unreported. The opinion of the Court of Appeals (R. 369-376), with the dissenting opinion, is reported at 199 F. 2d 8.

JURISDICTION

The judgment of the Court of Appeals was entered September 2, 1952 (R. 376). A petition for rehearing, filed September 22, 1952 (R. 377-388), was denied October 1, 1952 (R. 389). The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

Whether the regulation of the Administrator of the Wage and Hour Division, United States Department of Labor, defining "area of production" pursuant to Section 13(a)(10) of the Fair Labor Standards Act of 1938, as amended, is valid as applied to employees engaged in duties at a cotton compress warehouse.

STATUTE INVOLVED

The statutory provision and administrative regulation involved are set forth in the Appendix, *infra,* pp. 20-23.

STATEMENT

This case was begun as an employees' suit for unpaid wages claimed to be due under Section 16(b) of the Fair Labor Standards Act (R. 2-4). The Secretary of Labor intervened and prayed for an injunction against continued violations of the Act. No final judgment has as yet been entered in the employees' suit (R. 29). However, the trial court denied the Secretary's prayer for injunction

(R. 31) on the ground that the Administrator's regulation defining "area of production" pursuant to Section 13(a)(10) of the Act, was invalid (R. 29), and this judgment was made final and appealable by appropriate determination and direction under Rule 54(b) of the Federal Rules of Civil Procedure (R. 31). The Court of Appeals for the Tenth Circuit reversed, holding that the regulation was valid (R. 376).

Petitioner owns and operates several establishments where it compresses and stores raw cotton (R. 33), much of which is shipped to other states (R. 21-22). Five of its employees, all of whom were employed as watchmen at petitioner's Muskogee, Oklahoma, plant (R. 19, 21), are admittedly being compensated at less than the statutory minimum rate of 75 cents per hour, their rate of pay being only 47½ cents per hour (R. 19, 21). Petitioner claims exemption from the Act under Section 13(a)(10) [Appendix, *infra*, p. 20]. That section exempts from both the wage and hour requirements of the Act employees engaged in certain specified processes, including the compressing and storing of cotton, "within the area of production (as defined by the Administrator)." It is conceded (R. 22, 24-25, 28, 370) that petitioner's employees do not come within the terms of the Administrator's regulation defining "area of production" [Appendix, *infra*, pp. 20-23]. Petitioner, however, contends that this regulation is invalid.

The regulation in question, effective December 25, 1946, was promulgated about two years after a previous definition of "area of production" had been held invalid in *Addison* v. *Holly Hill Co.*, 322 U.S. 607. The defect of that definition was its inclusion of a limitation on the number of employees that might be employed in the plant seeking exemption. The "redefinition" was issued after careful study of this Court's opinion in the *Holly Hill* case, after extensive investigation and conferences with various interested parties, and after a public hearing conducted on behalf of the Administrator, at which testimony, recommendations, and representations were adduced by industry and employee representatives, including operators of cotton gins, warehouses, and compress warehouse plants (Fdg. 20, R. 27). In addition, numerous informal conferences with representatives of labor and of the industries involved were held throughout the country. Economic reports dealing with specific commodities affected were prepared and substantial economic data assembled by the Department of Labor (R. 339). Six formal hearings were held, one of which dealt specifically with cotton (R. 339).

The objective of the redefinition was to meet the requirement of *Holly Hill* that the definition be in terms of "area" or "geographic bounds," but also with recognition that the task involved "complicated economic factors" which "the Adminis-

trator may properly weigh and synthesize." 322 U.S. at 614-616. The redefinition omitted the objectionable limitation of the previous definition and prescribed that the place of employment must be located (1) within a rural area and (2) within a specified mileage distance from the sources of supply of 95 percent of its commodities.

As it pertains specifically to cotton compress warehouses, this definition requires that to be exempt from the Act the employment must be (1) within a rural area not in or near a city of more than 2,500 population and (2) within 50 airlines miles of the sources of supply of 95 percent of the commodities received at the plant. Petitioner's Muskogee plant does not meet either of these conditions, inasmuch as it is located "within the city limits" of a city of more than 37,000 (R. 22), and, except for a few isolated months, its cotton receipts from points beyond the 50 mile boundary substantially exceeded the five percent tolerance during the last two years (R. 24-25).

At the time of issuance of the redefinition, the Administrator "made rather lengthy findings" (Fdg. 22, R. 27) "intended to provide a statement of the major considerations entering into the promulgation" of his redefinition (R. 337). These findings (R. 337-358) explain the manner in which the Administrator sought to apply the principles enunciated in *Holly Hill*.

Petitioner's position is that the Administrator's "authority is limited strictly to defining in a reasonable and valid manner the actual and existing area of production of each agricultural commodity as created by climatic conditions and the planting habits of the farmers of the Nation" (R. 10). It introduced extensive evidence for the purpose of showing that cotton is grown over a very large area of this country, and that Muskogee is within the general outlines of that area. Petitioner also introduced rather extensive evidence as to the type of labor employed in cotton compress-warehouses, the costs of such labor and the relation of such costs to prices paid the farmer (R. 32-108). The stipulation of facts which, with its appendices, comprises the bulk of the record (Pltf. Ex. No. 1, R. 109-317), consists for the most part of this type of evidence. It also includes a summary of a survey conducted by the National Cotton Compress and Cotton Warehouse Association (of which petitioner is a member). This survey was an effort to determine how many of such plants could qualify for exemption under the conditions of the Administrator's definition of "area of production" (R. 137-140).[1]

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[1] Only a small proportion of the plants reported in response to the survey. Of the number reporting, 9% of the compress warehouses reported that they met the conditions of the definition to qualify for exemption, while 20% of the warehouses without compress machinery reported qualification for exemption (R. 138). The reporting plants serviced altogether

The trial court held the redefinition invalid on the ground that "the emphasis was placed upon the economic balance between rural agricultural and urban industrial conditions" and "has little reasonable or necessary relation to the actual Area of Production, as the term is ordinarily understood" (R. 28). The Court of Appeals reversed (Judge Pickett dissenting) on the ground that the criteria of the redefinition conformed to the geographic requirements of the statute, as analyzed in the *Holly Hill* opinion, and that the Administrator properly weighed and synthesized the relevant economic factors in an attempt "to arrive at an economic balance between rural and industrial labor conditions" (R. 369, 374).

ARGUMENT

We believe the decision below is correct and presents no conflict with the decision of any other Court of Appeals. However, as this Court observed in *Holly Hill*, the question of the validity

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54% of the total United States cotton production for the season inquired about, thus obviously representing the largest establishments. It may be assumed, that in addition to the above percentages reporting qualification for exemption under the redefinition, many of the smaller non-reporting establishments would also probably qualify for exemption. Evidence introduced by intervenor indicated that over 80% of the cotton gins, which are closer to the farm than either the storage or the compress warehouses, would probably meet the conditions for exemption (Intervenor's Ex. No. 2, p. 10, R. 358).

of the definition of "area of production" is "a much litigated question of importance in the administration of the Fair Labor Standards Act." *Addison* v. *Holly Hill Co.*, 322 U.S. 607, 609. Although the decision below is the first appellate court decision on the question of the validity of the redefinition, there are, as petitioner points out (Pet. 7, 25), a number of cases pending in lower federal and state courts in which the question has been raised. Inasmuch as the definition is determinative of the applicability of the Act to numerous employees employed in a wide variety of activities, and as there have already been many years of delay in enforcement of the Act with respect to such activities because of the invalidity of the Administrator's previous definition, a determination by this Court of the validity of the new definition at this time seems advisable. Therefore, we do not oppose certiorari.

1. In upholding the validity of the Administrator's redefinition, the court below correctly applied the standards delineated in this Court's opinion in *Holly Hill*. While holding that Congress intended the definition to be drawn in terms of "area" and "territorial bounds," this Court explicitly recognized that the Administrator's task was not a simple map-making task, but involved "complicated economic factors that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural

commodities and more or less near their production." 322 U.S. at 613-614. Contrary to petitioner's understanding that under the *Holly Hill* decision "the Administrator is restricted to defining the geographic bounds of the land area within which that commodity is actually produced" (Pet. 9), this Court expressly recognized in that decision that the "delimitation of territory" must be made "*in relation to* the [relevant] complicated economic factors" (322 U.S. at 613-614), and that there is a "choice of areas open to [the Administrator]" depending upon consideration of these economic factors (*id.* at 619). As stated by the court below, "from the *Addison* [*Holly Hill*] case, we are clear that 'area of production' cannot be measured or delineated by the mere fact of production alone. If the task had been deemed that simple, Congress could have easily provided its own definition without resort to administrative implementation" (R. 371).

The *Holly Hill* opinion repeatedly emphasized that the Administrator "may properly weigh and synthesize all such [economic] factors" and that "Congress gave the Administrator appropriate discretion to assess all the factors relevant to the subject matter." 322 U.S. at 614. The Administrator spent approximately two years investigating these factors, weighing and synthesizing them so that, as nearly as practicable, they would be reflected in terms of the areas designated

by his redefinition. His findings accompanying his redefinition describe the considerations underlying the definition and specifically indicate the manner in which he sought to comply with the guides laid down in the *Holly Hill* opinion. (R. 337-338). The two basic criteria included in the redefinition are both formulated in terms of geographic area, but at the same time they take into account the complicated economic factors which, as this Court recognized, Congress intended to be considered.

The requirement that there be a "delimitation of territory" taking into account the Congressional intent to exempt "enterprises concerned with agricultural commodities and more or less near their production" (322 U.S. at 613, 614) appeared to the Administrator to suggest and approve a mileage test measured by the distance from which establishments draw the agricultural products on which they perform their function (R. 349-350). The Administrator found that the data available clearly indicated that a mileage limitation would serve to distinguish generally between establishments which were "located principally to serve the nearby farms" and those whose location was occasioned by "reasons involving nearness to terminal facilities, markets, labor supply or other such considerations" (R. 350). The pertinent economic factors were found to require different distances for

different types of operations on agricultural commodities. Another consideration involved reconciling the conflicting views of industrialists and labor representatives, whose recommendations gravitated toward exempting all or none, respectively (R. 343-344). Either view was, of course, contrary to this Court's express recognition that "the Act exempts some but not all of the employees engaged in these industries" (R. 341; 322 U.S. at 620). The Administrator resolved the conflict by establishing precise mileage limitations with a five percent tolerance so as to avoid discrimination not based on substantial economic differences. The most generous distance of all—50 miles—was provided for the cotton compress-warehousing industry (R. 352). As indicated by plaintiffs' exhibit No. 39 (R. 317), except for the Southeastern States, where much cotton is transported to nearby mills without compressing (R. 113, 140), most cotton is grown within 50 miles of a compress warehouse (R. 140, 317).

As noted by the court below, a distance test, similar to the one here applicable was a basic criterion of the definition in issue in the *Holly Hill* case. The court below observed that this Court, "impliedly at least, sanctioned its relevancy as a permissible economic factor" (R. 373). See also *Fleming* v. *Farmers Peanut Co.*, 128 F. 2d 404 (C.A. 5). Such a require-

ment would appear to be a geographic limitation in its most elementary sense. The unsoundness of petitioner's objection to the mileage criterion is exemplified by the extreme position taken by the representative of the cotton compressors at the Administrator's hearings. He opposed the use of any mileage requirement, seeking exemption in such broad terms as to bring within the "area of production" even the plants receiving cotton from foreign countries (R. 350, 372).

The second criterion of the redefinition—that the employment be within a rural area—was based upon the plain Congressional intent to distinguish "between rural communities and urban centers" (R. 338; 322 U.S. at 615). This problem was approached directly by drawing the bounds of the area of production so as to exclude, insofar as was feasible in a definition of general application, the centers of industrial production without excluding the areas of agricultural production. "An analysis of all the available data indicated * * * that while the size of a town is not a perfect criterion of its urban or industrial character, it is nevertheless the best available test, and leads to results which in general are accurate enough to warrant its adoption" (R. 345). Here again there was need to reconcile the conflicting recommendations of labor and industry (R. 346). The results reached by other Government agencies having long experience in distinguishing between rural and urban areas were heavily relied upon in

choosing the 2,500 population figure (R. 347). As the industrial areas of cities were found generally to extend at least short distances beyond their political boundaries, a mileage tolerance for this test was found necessary to avoid discrimination not based on substantial economic differences (R. 348-349).

Although this Court expressly declined to comment on the validity of the "population" (more accurately designated "rural area") test in *Holly Hill*, because the establishment there involved met this test, 322 U.S. at 610, it is an indisputable fact that substantially all agricultural production of any significance is carried on in rural areas and not in urban centers. Obviously this is one of the "economic factors" which the Administrator could scarcely ignore. Even under petitioner's view, therefore, that "the Administrator is restricted to defining the geographic bounds of the land area within which that commodity is actually produced" (Pet. 9), it is difficult to find fault with that part of the definition which merely excludes the centers of urban population. This aspect of the definition accords with the legislative history, which shows that Congressman Biermann, who sponsored the statutory provision in question,[2] indicated "plainly

[2] See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384, 394-395, rehearing denied, 341 U. S. 956. "It is the sponsors that we look to when the meaning of the statutory words is in doubt."

enough" that he had in mind differences between establishments in "rural communities and urban centers," 322 U.S. at 615.

2. The definition advocated by petitioner and representatives of the cotton compress warehouses, which would exempt practically all cotton compress warehouses, would plainly be inconsistent with the admonition in the *Holly Hill* opinion that "the Act exempts some but not all of the employees engaged in these industries" 322 U.S. at 620. In rejecting a comparable suggestion urged in that case, this Court said: "To hold that all individuals 'engaged in [the operations listed in Section 13(a)(10)]' are exempt from the operation of the Act is obviously to fly in the face of Congressional purpose." 322 U.S. at 619-620.[3] The fact that the Administrator's redefinition results in exemption for fewer compress warehouses than for ginning and storage plants is wholly consistent with the purpose of the exemption. As this Court pointed out, of the eleven exemptions from both minimum wage and overtime requirements provided in the Act, "Employment in agriculture is probably the

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[3] That no wholesale exemption was intended for employees engaged in cotton compressing, warehousing, ginning and baling is specifically evident from the legislative history. When the Act was first being considered, a specific amendment to exempt such employees was proposed and rejected. 81 Cong. Rec. 7887 (1937). Two further attempts to exempt ginning by expanding the definition of exempt agriculture were also subsequently rejected. 81 Cong. Rec. 7951-7952 (1937); 82 Cong. Rec. 1785-1786 (1937).

most far-reaching exemption." The Section 13(a)(10) exemption was intended to reach employment "closely related" to agriculture—"those workers engaged in processes necessary for the marketing of agricultural products and employed 'within the area of production' of such commodities." 322 U.S. at 612.

The evidence in this record demonstrates conclusively that compressing cotton is much further removed from agriculture and usually much closer to industrial operations (which are not exempt from the Act) in both economic status and sequence of operations. Consequently, it is entirely reasonable and appropriate that an exemption extending to "some but not all of the employees engaged in these industries" (322 U.S. at 620) should have wider operation in those of the named occupations which are closer to the farm economically, physically, and functionally than in those of the named operations which are closer to industry in these ways. And compress warehousing stands at the industrial end of the operations named in Section 13(a)(10).

After cotton is harvested on the farm, it is transported to the gin by the farmer, who, at least in the area served by appellee's Muskogee plant, then sells his cotton at the gin (R. 37-38). After ginning and baling, the cotton may be stored for a period, and then, except in the Southeast (R. 113, 140), it is transported to a compress warehouse (R. 112-113, 140). The compress warehouse receives

its cotton in bales either from the gin, a warehouse or other storage location, and in cases of "reconcentration" (R. 114), from other compress warehouses (R. 112-114).

The principal function of the cotton compress is to compress the bales of cotton so that they can be more easily and economically stored and transported, especially the latter (R. 22, 112-113). The compress also provides storage facilities, which naturally involves protection from the weather, fire, and other such hazards (R. 114-115). It has a sorting function, dividing the bales into the 100 bale lots of the same, or "even running," "grade," "staple" and "character" (R. 109-111) which the spinning mills require before they will buy the cotton (R. 110-111). Most transportation of cotton *from* the compresses to the mills, is by rail (R. 112-113), though most *to* the compresses is by truck (R. 109, 358, Intervenor's Exhibit No. 2, p. 33), and the railroads have developed detailed and complicated freight rate arrangements to encourage use of their services (R. 112).

It appears that the cotton compress warehouse is usually a large plant covering a considerable area and represents a large investment in capital (R. 48-49). Appellee's plant at Muskogee is somewhat larger than the average interior plant (R. 49), but apparently is not at all unique (R. 49). There is a need for railroad

switching and other railroad services (R. 46), and for fire protection, requiring an adequate water supply (R. 47). A new compress machine costs about $75,000 (R. 48). The plant at Muskogee has two machines (R. 48). Thus the cotton compress plant itself is characteristic of an industrial rather than an agricultural enterprise. As stated by the Administrator in his findings incident to the promulgation of this definition, the economic studies reveal that "Their [the cotton compresses'] relationship to the farmer and to agriculture is considerably more remote, for example, than that of the cotton gins, the warehouses" (R. 351).

3. The most recent legislative history in connection with the 1949 Amendments to the Fair Labor Standards Act contains strong affirmative evidence that the Administrator's 1946 redefinition has the approval of Congress. Although Congress was fully advised of the objections which petitioner here advances, it specifically refused to make any changes in this particular exemption. Prior to the enactment of the 1949 Amendments, there was a comprehensive consideration by Congress of the provisions of the Act and many sections were amended. Section 13(a)(10), together with the Administrator's definition of the term area of production, was among the provisions considered, and specific detailed consideration was

given to cotton compressing and warehousing as affected by the Administrator's definition. Counsel for petitioner here (R. 32) appeared before both the Senate and House Committees and presented precisely the same arguments and virtually the same data presented to the court in the instant case. (Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare on S. 58, S. 67, S. 92, S. 105, S. 190, S. 248, and S. 653, 81st Cong., 1st sess. (1949) pp. 658-705; and Hearings before the House Committee on Education and Labor on H. R. 2033, 81st Cong., 1st sess. (1949) Vol. 1, pp. 872-887, 912-945. Cf. Stipulation of Facts, R. 109 *et seq.*).

Although both the Senate and House Committees heard extended testimony and considered various proposals for amending Section 13(a)(10), the bill as passed, which made substantial changes in many other provisions of the Act, left this Section unchanged. 95 Cong. Rec. 14933 (1949).

This legislative history of the 1949 Amendments calls for application of the principle frequently applied by the Supreme Court, aptly stated in *Brewster* v. *Gage*, 280 U.S. 327, 337:

> The substantial reenactment in later Acts of the provision theretofore construed by the department is persuasive evidence of legislative

approval of the regulation. *National Lead Co.* v. *United States,* 252 U.S. 140, 146. *United States* v. *Cerecedo Hermanos y Compania,* 209 U.S. 337, 339. *United States* v. *G. Falk & Brother,* 204 U.S. 143, 152.

To the same effect, see *Helvering* v. *Reynolds Co.,* 306 U.S. 110, 114-115. See also *National Labor Relations Board* v. *Gullett Gin Co.,* 340 U.S. 361, 366.

CONCLUSION

While we think the decision below is correct, in view of the importance of the question and the volume of pending and anticipated similar litigation, a definitive determination of the question at this time seems advisable. Therefore we do not oppose the granting of the petition for certiorari.

Respectfully submitted,

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DECEMBER, 1952.

APPENDIX

Statutory Provisions Involved

Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended by the Act of October 26, 1949, 63 Stat. 910, 29 U.S.C., Supp. V, 206, 213:

Sec. 6.(a) Every employer shall pay to each of his employees who is engaged in commerce, or in the production of goods for commerce, wages at the following rates—

(1) not less than 75 cents an hour;

* * * * *

Sec. 13.(a) The provisions of sections 6 and 7 shall not apply with respect to * * * (10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products;

* * * * *

Text of the Administrator's regulation defining the "area of production."

(29 C.F.R. 536.2 (Federal Register, December 25, 1946, 11 F.R. 14648, 13 F.R. 7347)

"Area of production" as used in section 13(a)(10) of the Fair Labor Standards Act. (a) An individual shall be regarded as employed in the

"area of production" within the meaning of section 13(a)(10) of the Fair Labor Standards Act in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95 percent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air line distances from the establishment:

(i) With respect to the ginning of cotton—10 miles;

(ii) With respect to operations on fresh fruits and vegetables—15 miles;

(iii) With respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection—20 miles;

(iv) With respect to the compressing and compress-warehousing of cotton, and operations on tobacco, grain, soybeans, poultry or eggs—50 miles.

(b) For the purposes of this section:

(1) "Open country or rural community" shall not include any city, town or urban place of 2,500 or greater population or any area within:

(i) One air-line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000 or

(ii) Three air-line miles of any city, town or urban place with a population of 50,000 up to but not including 500,000, or

(iii) Five air-line miles of any city with a population of 500,000 or greater,

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources of supply shall be the last preceding calendar month in which operations were carried

on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 441

TRADERS COMPRESS COMPANY, a corporation, *Petitioner,*

v.

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Traders Compress Company, prays that this Court grant rehearing of its order of December 22, 1952, denying the petition for writ of certiorari, — U. S. —, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case as prayed for in the petition filed herein November 7, 1952.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. The majority opinion of the Court of Appeals, in the following particulars, represents such a distinct departure from the accepted, usual, and proper course of judicial proceedings as to warrant exercise by the Supreme Court of its supervisory powers over the federal judiciary.

The court below properly accepts *Addison, et al.* v. *Holly Hill Fruit Products, Inc.*, 322 U. S. 607, as the leading case on the question at bar. Further, the court below properly recognizes that the factual crux of this Court's decision in the *Holly Hill* case was that the number of employees test, prescribed as a part of the prior definition of the "area of production", discriminated between (smaller and larger) plants located within the prescribed geographical area. The following finding by the majority of the Court of Appeals is an indispensable basis for its decision:

> "To be sure, the population test does not effect discrimination between plants in the same geographical area, as did the number of employees test condemned in the Addison case." (R. 374)

The record contains not a scintilla of evidence to support this conclusion.

As indicated at pages 10-11 of the petition for certiorari, the evidence of record clearly shows that the population test does produce discrimination within the same (prescribed) geographical area. When promulgating the present definition the Administrator admitted (R. 342) that the population test of the current definition creates discrimination between plants within the prescribed area.

For example, plaintiffs' Exhibit 6 (R. 145) shows the fifty-mile circle of the regulation drawn around the compress-warehouse location of Walnut Ridge, Arkansas, population 2,013. Employees engaged in compressing, storing, and handling cotton at the Walnut Ridge

compress-warehouse plant are therefore exempt under the current regulation in any given month if, during the preceding month, 95% or more of cotton receipts was received from points within the fifty-mile circle and not from places in or near points having populations of 2,500 or more. Within that circle, competing compress-warehouse plants are located at Batesville, Newport, Jonesboro, Truman, and Marked Tree, Arkansas, each of which locations has a population of 2,500 or more (R. 243). The population test (regardless of the effect of the distance test on receipts) denies the exemption to each of those five plants. By using the plant location and population data shown at Record pages 243-249 and 253-257, and maps such as those shown at Record pages 143, 145, and 147, this example can be multiplied many times by drawing a circle of fifty miles radius about each compress-warehouse plant location having a population under 2,500 (e.g. Arbyrd, Mo., Lepanto, Ark., Delhi, La., Shaw, Miss., Hubbard, Tex., Henderson, Tenn., etc.)

Thus, this indispensable factual basis of the majority opinion of the Court of Appeals is utterly contrary to the stipulated evidence of record.

2. The arbitrary character of the definition upheld by the majority opinion of the Court of Appeals is demonstrated by Respondent's own arguments, and the Administrator's own explanation of his definition and why and how it was formulated as it was.

In support of his proposition that the definition should exclude compress-warehouse plants, or most of them, from the exemption, Respondent in his memorandum (pp. 15-17) argues that such plants are "industrial" in character rather than "agricultural", and quotes from the Administrator's "finding" (R. 350-351) that the relationship to the farmer and to agriculture of cotton compress-warehouse plants *located at seaports* "is considerably more remote, for example, than that of the cotton gins, the ware-

houses, and even the inland compresses." Whether or not this is true of any or all compress-warehouse plants is wholly immaterial. In § 13 (a)(10) of the Fair Labor Standards Act Congress provided no authority for graduated degrees of application of the exemption to the different operations named therein on the basis of their relative "nearness" (in character of plant and operations) to agriculture or industry. Congress treated all alike—gins, warehouses, compress-warehouse plants, and all other establishments engaged in packing, storing, drying, preparing, etc., of agricultural and horticultural commodities. The admitted discrimination is purely arbitrary.

The Administrator's office has been consistently critical of the policy and wisdom of this exemption. Its annual reports to Congress have urged that Congress repeal the exemption, or grant the Administrator plenary power to modify the Act's requirements (Annual Reports for 1939, p. 10; 1941, pp. 66, 83-84; 1942, p. 13; 1943, pp. 7-8; 1944, pp. 7-8; 1945, p. 11; 1946, pp. v, 52-53; 1947, p. 50; 1948, pp. 47, 129-131; 1950, pp. 281, 283, 285, 287; and 1951, p. 48.)

Respondent in his memorandum (p. 10) and the Administrator in his "findings" (R. 350-351) indicate that the mileage tests of the definition are deliberately designed for the purpose of restricting the exemption to establishments "located principally to serve nearby farms", and of denying exemption to plants the locations of which were chosen "for reasons involving nearness to terminal facilities, markets, labor supply", etc. Thus the mileage tests are admittedly arbitrary and designed to serve arbitrary and unrelated purposes not authorized by the Act. Congress was concerned with the proximity of the establishment to agricultural production, and the economic influences of (and on) such production,—not with restriction of service to nearby farms, or with the factors and compromises necessarily involved in the selection of plant sites. There is nothing in the Act or in the *Holly Hill*

decision to support the Administrator's denial of the exemption (by distance tests) to plants which are immediately surrounded by (and dominated by the economic influences of) cotton production, because they serve *all* surrounding farms desiring their services and do not restrict such services to the produce of *nearby* farms.

The population test is utterly arbitrary. As noted in the dissenting opinion of Judge Pickett (R. 376), "the population of a city or town has no reasonable relation to the question of whether a plant is located within an area of production". The test was "borrowed" from other governmental agencies (R. 347) who developed and employed it for entirely different purposes and in entirely different circumstances. Respondent argues in his memorandum (p. 12) that there is—and the Administrator, in his "findings", assumed (R. 338)—a congressional intent in § 13(a)(10) to distinguish "between rural communities and urban centers." Such an intent cannot be found in § 13(a)(10) of the Act or in its legislative history. Argument for such intent is refuted by the very authority cited as its only support,—this Court's decision in the *Holly Hill* case, 322 U.S. at 615,—where, after reviewing the only possible source of such an idea in the Act's legislative history, this Court concluded:

> "Certainly, Mr. Biermann did not give the remotest intimation that 'area of production' was meant to convey any idea other than that which area usually conveys." (Ibid., footnote 8)

Respondent's arguments and the Administrator's explanation reveal that the Administrator has employed criteria which are not authorized by the statute, either of itself, or as construed by this Court in the *Holly Hill* case; and that the real purpose and basis of his definition is the obvious determination of the Administrator to restrict and withhold, so far as possible, any application of the 13(a)(10) exemption.

3. Denial of certiorari herein is not supported by Respondent's argument (pp. 17-19 of his memorandum) that, by failing to change § 13(a)(10) in the 1949 amendments of the Act, Congress approved either the Administrator's regulation, or the criteria employed therein.

As repeatedly emphasized by this Court in the *Holly Hill* case, the language of the exemption is clear and plain. The words of the exemption are "familiar English words", "addressed to the common run of men" and should be given their normal and literal meaning (322 U. S. 607, 618). Therefore, there is no occasion for application of the "re-enactment rule" which at most is merely an aid in statutory construction which may be useful at times when the meaning of the statutory words is uncertain or obscure, or when their literal construction would lead to absurd results. "Where the law is plain the subsequent re-enactment of a statute does not constitute adoption of its administrative construction." *Biddle* v. *Commissioner of Internal Revenue* (1938), 303 U.S. 573, 582, 56 S. Ct. 379, 383; *Koshland* v. *Helvering* (1936), 298 U.S. 441, 447, 56 S. Ct. 767, 770; *Helvering* v. *Reynolds* (1941), 313 U.S. 428, 432, 61 S. Ct. 971, 973.

Actually, both houses of Congress have sharply condemned both the present definition, and prior definitions employing the same criteria. April 5, 1946 the Senate passed S. 1349 including an amendment of § 13(a)(10) of the Act which would have transferred the power to define the "area of production" from the Administrator to the Secretary of Agriculture. Congress adjourned without that bill receiving action in the House of Representatives. In proposing this amendment, Senator Wiley (92 Cong. Rec. 3169-70) said, in part:

> "I submit, Mr. President, that the 'area of production' concept has not been given a fair trial.... The definitions which the Administrator has issued have been strained and unrealistic and clearly designed to restrict the application of the exemption to the fewest possible number of persons engaged in the occupa-

tions named in the exemptions. *This has been done . . . by defining 'area of production' in terms of the distance which commodities move from the farm to the plant at which they are handled, . . . in terms of the population of the towns where the processing establishments are located.* The courts . . . have quite properly held such definitions invalid, because, if given effect, they would frustrate the intention of the Congress in enacting the exemptions.

" . . . It can scarcely be doubted that they (the Administrator's improper definitions) are also, in part, the result of *the intent of the Administrator to nullify—in so far as possible—the exemptions granted by the Congress.*" (Emphasis added.)

Three years later (and after promulgation of the present definition) the amendments of 1949 were adopted. H. R. 5856, passed by the House of Representatives August 11, 1949, included the identical amendment of § 13(a)(10) proposed by Senator Wiley and passed by the Senate in S. 1349, April 5, 1946. The corresponding Senate bill, as passed, contained Senator Eastland's amendment which provided in effect that the § 13(a)(10) exemption should apply to persons employed in, about or in connection with the storing, compressing or ginning of cotton, or the processing of cottonseed, "in any county in which cotton is produced as shown in the most recent annual production report of the Bureau of the Census." (Cong. Rec. Aug. 31, 1949, p. 12804).

Although, with respect to cotton, the purpose of the House and Senate amendments was identical, the language was different, and the technicalities of conference committee procedure resulted in deletion of both amendments—but with the distinct understanding that such action did not constitute approval of the Administartor's construction or definition. See the debate between Senator Fulbright and Senator Pepper, immediately before Senate adoption of the conference report (Cong. Rec., Oct. 18, 1949, pp. 15201-2), where Senator Pepper, as floor leader

for the bill and chairman of the conference committee, said:

> "I think it is the consensus of opinion of the conferees that they hope the Wage and Hour Administrator will constantly endeavor to improve the definition of 'area of production' and, especially in the case of cotton, that he will apply it as liberally as possible." (p. 15201)

Thus, any argument for application of the "re-enactment rule" is wholly without merit.

CONCLUSION

In his memorandum (pp. 7-8, 19) Respondent does not oppose certiorari. Respondent agrees that validity of the contested definition is a much litigated question of importance in the administration of the Fair Labor Standards Act, and that a definitive determination of the question by the Supreme Court at this time is considered advisable by Respondent.

Unless and until such a conclusive and definitive determination is made by this Court, enforcement of the majority opinion of the Court of Appeals in the Tenth Circuit will create new competitive discrimination between all (R. 26, Finding 17; R. 241) compress-warehouse plants in that circuit and competing plants in other circuits.

For the reasons set forth above and in the petition for writ of certiorari, it is respectfuly urged that rehearing

be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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January 6, 1953

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the rules of this Court.

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Counsel for Petitioner

Supreme Court, U.S.
FILED
JAN 8 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1952

No. 441

TRADERS COMPTROLLER COMPANY, a Corporation, *Petitioner*,

v.

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor, *Respondent*

MEMORANDUM FOR THE NATIONAL COTTON COUNCIL OF AMERICA AND THE AMERICAN FARM BUREAU FEDERATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 441

TRADERS COMPRESS COMPANY, a Corporation, *Petitioner*,

v.

MAURICE J. TOBIN, Secretary of Labor, United States Department of Labor, *Respondent*

MEMORANDUM FOR THE NATIONAL COTTON COUNCIL OF AMERICA AND THE AMERICAN FARM BUREAU FEDERATION AS AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Written consent of all parties to the filing of this memorandum has been obtained as required by Rule 27 of this Court.

The National Cotton Council of America is a national non-profit organization whose membership embraces every segment of the raw cotton industry, including cotton farmers in all of the cotton producing states, cotton ginners, cotton warehouse and compress warehouse operators, cottonseed processors, cotton merchants and spinners.

The American Farm Bureau Federation is a voluntary general farm organization composed of 1,492,282 farm families in forty-seven states of the United States and Puerto Rico.

This action involves the validity of the regulations defining "area of production" as used in Section 13(a)(10) of the Fair Labor Standards Act of 1938, as amended.[1] This section of the Act provides an exemption from the wage and hour provisions of the Act for "any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products."

The question relates to the validity of the population and distance limitations, contained in the definition of "area of production."[2]

The United States District Court for the Eastern District of Oklahoma held that the definition had no reasonable relationship to the purposes of the exemption and was therefore arbitrary and capricious. The United States Court of Appeals for the Tenth Circuit (one Judge dissenting) held the regulation valid and reversed the District Court.

The National Cotton Council of America and the American Farm Bureau Federation respectfully urge this Court to review the judgment of the court below for the following reasons:

1. The proper determination of the "area of production" and the proper application of the exemption provided by Section 13(a)(10) of the Act are of the utmost importance to and affect practically all farmers of the nation. The legislative history of the Act and the opinion of this Court in *Addison et al.* v. *Holly Hill Fruit Products, Inc.*,[3] clearly show that the Congress in granting the exemption expressed in Section 13(a)(10) was acting for the

[1] See Appendix A, p. 8, *infra*.

[2] See Appendix B, p. 8, *infra*.

[3] 322 U. S. 607, 64 S. Ct. 1215

protection of the farmer so as to make possible the storage, processing and marketing of his crops at reasonable cost and free of the incidence of the wage and hour provisions of the Act in facilities and markets which he normally is compelled to use. Thus, not only has employment in agriculture been completely and entirely exempted under Section 13(a)(6) of the Act, but Section 13(a)(10) extends this basic agricultural exemption to all non-agricultural employees who perform certain specified activities in connection with the marketing of agricultural commodities in the "area of production." Unless "area of production" is defined in the light of the fundamental purpose of Congress in creating the exemption, additional financial burdens will be placed on farmers contrary to the specific exemption granted by Section 13(a)(10). We do not believe that these burdens should be placed on farmers in the absence of a review by this Court of the ruling below.

In addition to the effect of this question upon the farmers of the nation, there are many thousands of employees and employers who because of the uncertainties involved do not know the extent of their rights or obligations under Section 13(a)(10) of the Act.[4]

2. The definition of "area of production" and the scope of the exemption granted by Section 13(a)(10) has been the subject of much controversy and litigation ever since the enactment of the Fair Labor Standards Act of 1938, and unless the question is resolved and settled by this Court the Administrator and persons subject to the Act will be confronted with many serious problems.

The Administrator has promulgated at least four different definitions of "area of production", one of which was held invalid by this Court in *Holly Hill*. The various attempts to define this term are indicative of the uncertainty and confusion which exist in the administration of the Act. And the Administrator's view that the exemption

[4] 1948 Annual Report, Wage and Hour and Public Contracts Division, United States Department of Labor, pp. 125, 129.

has no sound justification has certainly not aided in eliminating the confusion or contributed to the promulgation of a proper definition.[5]

Because of the importance of the definition to effective administration, the Administrator appeared as amicus curiae in *Holly Hill* in support of the petition for a writ of certiorari and this Court in recognition of the national importance of the question involved granted the writ.[6] Unfortunately, however, the decision in *Holly Hill* has not brought an end to the controversy. Since that decision, as shown on page 7 of the petition for a writ of certiorari, at least eighteen actions have been brought in state and federal courts involving the validity of the current definition. Three of these cases were decided in favor of the defendants and fifteen are still pending. The Secretary of Labor, who has the responsibility for administering and enforcing the Act, apparently is strongly of the opinion that a definitive review of the question at this time is necessary. In his memorandum in reply to the petition for a writ of certiorari, he points out that the definition of "area of production" is determinative of the applicability of the Act to numerous employees employed in a wide variety of activities and that there have been years of delay in the enforcement of the Act because of the invalidity of prior definitions. He further states that review is desirable at this time because of pending and anticipated similar litigation.[7]

If the decision of the court below is not reviewed by this Court, uncertainty, confusion and administrative difficulty can be expected to continue and additional litigation to result. Moreover, application of varying definitions in different judicial circuits would cause economic discrimination and result in an intolerable administrative situation.[8]

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[5] Op. cit., supra note 4, pp. 130, 131, 134.

[6] 320 U. S. 725, 64 S. Ct. 59.

[7] Respondent's memorandum pp. 8, 19.

[8] The cases cited in Appendix E, page 26 of the petition for a writ of certiorari indicate that this condition exists now.

The case at bar involves a question which was reserved by this Court in *Holly Hill.* It also involves every facet of the present definition and therefore invites definitive review.

3. The definition of "area of production" contained in the current regulations is arbitrary and the court below erred in reversing the district court and holding the definition valid.

This Court, in *Holly Hill,* held that the Congress in granting exemptions for workers in the "area of production (as defined by the Administrator)" restricted the Administrator to the drawing of geographic lines after taking into consideration all relevant economic factors in the choice of areas open to him that operate between agricultural labor conditions and the labor market of enterprises concerned with agricultural commodities and located more or less near their production. Instead of following that decision and establishing geographic lines or areas after considering relevant economic factors to determine the boundaries of such areas, the Administrator employed a population test which arbitrarily excludes from the "area of production" all employment in towns or cities having a population of 2,500 or more. The Administrator on page 12 of his memorandum in response to the petition for a writ of certiorari states that results reached by other governmental agencies having long experience in distinguishing between rural and urban areas were heavily relied upon in choosing the 2,500 population figure. This heavy reliance upon, and virtual adoption of, a population test developed by other government agencies for entirely different purposes demonstrates the arbitrary manner in which "area of production" has been defined.

The fact that a village or town may consist of 2,500 people is not relevant to a determination of whether an individual employed therein is within or without the "area of production". Nevertheless, this population test is used in the regulation as being conclusive of the question and when

applied to compress warehouse plants such a test excludes from the "area of production" 82 percent of all such plants.[9] Had the Congress intended that a numbers test be used to restrict the "area of production," Section 13 (a)(10) could have so provided. In granting exemptions under Section 13(a)(8) and under Section 13(a)(11) relating to employees employed on newspapers, and switchboard operators employed in public telephone exchanges, the Congress limited the exemption to newspapers having a circulation of less than 4,000 and public telephone exchanges having not more than 750 stations. The fact that the Congress specifically provided for a numbers test in Section 13(a)(8) and in Section 13(a)(11) indicates that it did not intend for any such test to be arbitrarily employed in determining the "area of production" exemption in Section 13(a)(10).

Respondent in his memorandum at page 13 after pointing out that this Court expressly declined to pass on the validity of the population test in *Holly Hill*, because the establishment there met the test, argues that it is an indisputable fact that substantially all agricultural production of any significance is carried on in rural areas and not in urban centers and concludes that it is difficult to find fault with that part of the definition which excludes the centers of urban population. This line of reasoning clearly shows how the Administrator has misconceived the clear intent of Congress. Apparently, he assumes that towns of 2,500, since they are classed as urban for census purposes, are necessarily industrial areas and therefore outside the "area of production". If this had been the test which the Congress intended to be used, it could have obtained this result with simple and explicit language. The fact that it did not intend such application of the Act is clear from the language of the Act itself, the legislative history, and the decision of this Court in *Holly Hill*. These all show that the

[9] See petition for writ of certiorari, page 18.

legislative purpose was to exclude from the wage and hour provisions of the Act not only employment in agriculture but also certain non-agricultural activities reasonably related to the processing and marketing of agricultural commodities, in order to relieve farmers of additional financial burdens either in the form of specific charges or in a lessening of prices received for their commodities. Whether an activity is so related to agriculture as to be within the "area of production" is, as stated by this Court, dependent upon a consideration of all relevant economic factors. This the Administrator patently has not done. The definition is, therefore, arbitrary and invalid and unless stricken will result in unjustified competitive inequalities and grave economic dislocations.

For the reasons stated above and in the interest of sound and effective administration of an important federal statute about which there has been great uncertainty, confusion and much litigation concerning the scope of its application, it is submitted that the petition for rehearing should be granted and that, upon such rehearing, a writ of certiorari should issue.

Respectfully submitted,

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APPENDIX A

Fair Labor Standards Act of 1938, 52 Stat. 1060, as amended by the Act of October 26, 1949, 63 Stat. 910, 29 U.S.C., Supp. V, 213:

Sec. 13. (a) The provisions of sections 6 and 7 shall not apply with respect to * * * (6) any employee employed in agriculture * * * ; or * * * (8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where printed and published or counties contiguous thereto; or * * * (10) any individual employed within the area of production (as defined by the Administrator), engaged in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products; or (11) any switchboard operator employed in a public telephone exchange which has not more than seven hundred and fifty stations; * * * .

APPENDIX B

Text of the Administrator's regulation defining the "area of production." (29 C.F.R. 536.2)

"Area of production" as used in section 13(a)(10) of the Fair Labor Standards Act.

(a) An individual shall be regarded as employed in the "area of production" within the meaning of section 13(a)(10) in handling, packing, storing, ginning, compressing, pasteurizing, drying, preparing in their raw or natural state, or canning of agricultural or horticultural commodities for market, or in making cheese or butter or other dairy products:

(1) If the establishment where he is employed is located in the open country or in a rural community and 95 per cent of the commodities on which such operations are performed by the establishment come from normal rural sources of supply located not more than the following air lines distances from the establishment:

(i) With respect to the ginning of cotton—10 miles;

(ii) With respect to operations on fresh fruits and vegetables—15 miles;

(iii) With respect to the storing of cotton and any operations on commodities not otherwise specified in this subsection—20 miles;

(iv) With respect to the compressing and compress warehousing of cotton, and operations on tobacco (other than Puerto Rican leaf tobacco), grain, soybeans, poultry or eggs—50 miles.

(b) For the purposes of this section:

(1) "Open country or rural community" shall not include any city, town, or urban place of 2,500 or greater population or any area within

(i) One air-line mile of any city, town, or urban place with a population of 2,500 up to but not including 50,000, or

(ii) Three air-line miles of any city, town, or urban place with a population of 50,000 up to but not including 400,000, or

(iii) Five air-line miles of any city with a population of 500,000 or greater

according to the latest available United States Census.

(2) The commodities shall be considered to come from "normal rural sources of supply" within the specified distances from the establishment if they are received (i) from farms within such specified distances, or (ii) from farm assemblers or other establishments through which the commodity customarily moves, which are within such specified distances and located in the open country or in a rural community, or (iii) from farm assemblers or other establishments not located in the open country or in a rural community provided it can be demonstrated that the commodities were produced on farms within such specified distances.

(3) The period for determining whether 95 percent of the commodities are received from normal rural sources

of supply shall be the last preceding calendar month in which operations were carried on for two workweeks or more, except that until such time as an establishment has operated for such a calendar month the period shall be the time during which it has been in operation.

(4) The percentage of commodities received from normal rural sources of supply within the specified distances shall be determined by weight, volume or other physical unit of measure, except that dollar value shall be used if different commodities received in the establishment are customarily measured in physical units that are not comparable.